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Supreme Court of Texas.
In RE Lester Collins, M.D.
No. 07-0737.

November 12, 2008.

Appearances:
Brent Cooper, Cooper & Scully, PC, Dallas, for Relator.
Peter M. Kelly, Houston, Texas, for Real Party in Interest.

Before:

Chief Justice Wallace B. Jefferson; Don R. Willett, Harriet O'Neill, Dale Wainwright, Paul W. Green, Phil Johnson, Nathan L. Hecht, Scott A. Brister, and David M. Medina, Justices

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CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument in 07-0737 In re Lester Collins, M.D.

SPEAKER: May it please the Court. Mr. Cooper will present argument for the relator. Relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF BRENT COOPER ON BEHALF OF THE PETITIONER

MR. COOPER: May it please the Court. In this case, we have a situation where there has been a waiver of the privilege under the rules of evidence adopted by this Court. We also know that we have a waiver pursuant to an authorization that was executed by the plaintiff. And this authorization allowed the plaintiff to remit which treaters the waiver would extend. The authorization also allowed the plaintiff to -- with the periods of treatment or examination by each treater as far as what would be weighed.

JUSTICE O'NEILL: What happens if they put a date for an examination that you think is off-limits, but there's relevant and irrelevant information during that examination?

MR. COOPER: Well, I think if they were to eliminate that particular examination, your Honor, they concluded on part C and if you look at the authorization in 74.052, A is the list of the treaters, B is the list of the physicians -- the treaters who treated the plaintiff for that particular injury, B is the list of treaters who have treated the plaintiff for the past five years, and C is the list of treaters to whom either: one, there is no waiver; or to two -- number two, the inclusive dates of examination, evaluation, or treatment are to be well

withheld from disclosure.

In your case, if they were wanting to withhold a particular examination, if they had felt that there was both relevant as well as irrelevant, they could put that in C. If the defendant then wanted to challenge that and say that we believe that there is relevant testimony or information there, then they could challenge it through a subpoena, through a request deduction or something like that, and then the Court will -- it would be submitted to the Court in camera and the Court would have to make the determination of what is relevant and what is not relevant.

Now, in this case, in part A of the form that was sent by the plaintiff and each have H of the petition for Writ of Mandamus is the authorization, there were 25 healthcare providers listed as treating the plaintiff for the injuries for which suit has been brought. And obviously in this case, she was claiming that our doctor failed to diagnose cancer.

And if you look at all 25 of the treaters who are listed in Exhibit A of the plaintiff's authorization, they're all MD Anderson. If you look after each one of the names, it is someone from MD Anderson. Obviously, these are all people who treated the plaintiff for the cancer which she claims the defendant doctor should have caught.

Now, in this case, the Court of Appeals concluded that there was both relevant and irrelevant -- nonrelevant information with respect to those 25 treaters on Exhibit A. First, if you look at the record in this case particularly on pages 22 through 41 which is the plaintiff's Motion for Protective Order, you will see there's absolutely no evidence that any of these treaters from MD Anderson had information which was not relevant to the condition for which claim is being made in this case.

Number two, the plaintiff in this case had the opportunity and that it was -- you know, she under -- 74.052 she is the gatekeeper. She had the opportunity to put any of those 25 treaters on Exhibit C which is the least -- the list of excluded treaters or excluded examinations --

JUSTICE O'NEILL: So what if those -- what if the doctors -- the treaters in Exhibit A have possession of medical records of the doctors in Exhibit B or C?

MR. COOPER: Then obviously you could have a doctor listed in Exhibit A and then also you can put that doctor in Exhibit C and exclude dates of treatment, dates of examination, or other irrelevant portions that are there. That is provided for not only by HIPAA but by the Legislature when they passed Chapter 74 --

JUSTICE O'NEILL: So the plaintiff would go to each of these doctors in Exhibit A and would say, "Do you have any of my other medical records? If you do show them to me so I can except out everyday I was treated by those other doctors?"

MR. COOPER: In most cases, we find that plaintiffs have all of the medical records. They know what's -- there in fact in this case, Defense Counsel, if you look at the record, offered to allow all the medical records to be produced first to the plaintiff and then after the plaintiff had all the medical records then to have them produced to the defendant in this case, and then --

JUSTICE: Patient can always go get the records.

MR. COOPER: Patients always have a right to go get the records. They have an absolute right to them. And so --

JUSTICE O'NEILL: So at that --

MR. COOPER: -- so if they felt there was irrelevant information

that was contained in their records, they had a right to go get those records and then they have a right under the 74.052 authorization to list dates of treatment, examinations, or anything that they thought that was in those records that were not relevant to the injuries for which compensation was being sought.

JUSTICE JOHNSON: Would the plaintiff have a right to contact these physicians and say "Here are the injuries and we don't want you to talk to the other side about anything not related to these injuries," --

MR. COOPER: The exhibit --

JUSTICE JOHNSON: -- so that there could be conversations but -- would the plaintiff have the right to go instruct the witnesses that way?

MR. COOPER: They certainly have a right to have those conversations with the physicians and a lot of them do. Now, the question is whether or not if there is an authorization -- the physician must or must not obey that. Many of them will go ahead and say, "We've been asked by the patient not to have discussions with you about this." But we know from the legislative, I think, intent in passing Chapter 74 one of the goals was with the 60-day time period, we have the notice to allow defendant hospitals and defendant physicians a chance to evaluate to determine whether or not settlement should can -- or should be made during this time period.

And we know that one of the things that happened during the legislative session in which chapter 74 was passed was, if you look at the original bill and then what happened is it progressed on April -- I think it's April 15th of 2003, HIPAA became effective. And so the old authorizations that were being used under 4590(i) would no longer apply and we had to have an authorization that would comply with HIPAA.

In fact Senator Ratliff, and we have the legislative history that's attached to our brief -- referenced in our brief refer to the fact that this authorization that was included was designed to be HIPAA compliant with the federal law that took place, I believe on April 15th --

JUSTICE BRISTER: And it doesn't require the doctor to talk with Defense Counsel?

MR. COOPER: It does not require the doctor -- nothing requires the doctor to do -- to talk to Defense Counsel if he elects not to talk to the Defense Counsel.

JUSTICE GREEN: Well, as sort of my question -- I mean, I haven't taken a doctor deposition in 14 plus years, but my experience always was that in trying to talk to a doctor, they don't want to get caught up in controversies. They always hold mazes when -- send me a deposition subpoena and I'll talk to you. And is this really a big problem?

MR. COOPER: Well, I really believe, Justice Green, it is because there are a lot of cases where you may have a treating physician where there really is no issue and there's no need to take a deposition. And so if you don't allow the Defense Counsel to at least have a conversation, he's not going to know. And so then were going through the expense of having a deposition taking, have the doctor take half a day or full day out of his schedule when perhaps even a phone call or a 20-minute visit in his office --

JUSTICE GREEN: I understand that. I'm just -- I just didn't to know there are any doctors out there that would do that?

MR. COOPER: There are and a lot of them of course are very HIPAA informed and, you know, one of the things I think the Legislature was trying to do with this particular form was to give assurances to the

doctors because if you look at what's -- what's contained here the HIPAA form incorporates a notice letter, so the doctors put on notice of what injuries are being sought and then there is again a specific provision in here which says that you can have communication regarding the written findings you have as well as your verbal findings.

And so, the Legislature, with all due respect, I believe thought it was important that these conversations took place because it put both written as well as verbal in the authorization to try to save your deposition.

MR. CLINTON::529 JUSTICE O'NEILL: Well, but -- but I mean I don't see that saying the court's order here, but it says no ex parte communications. It doesn't necessary follow that you have to then have a deposition. I mean you could have an informal conversation on the phone where you patch in the plaintiff and -- and there -- I mean I don't see it as either or.

MR. COOPER: Well, that is possible. However, one of the things that a lot of the courts and -- and there's -- there's a rattling case that we cited from New York where they -- they do allow and do encourage the ex parte conversations. One of the things they did talk about is where you restrict a witness who has clearly unprivileged information, but you restrict that access to one party.

The court there found; one, it allows her to be witness intimidation; number two, they found that it would require the defense counsel basically to disclose his or her work product when they're talking to that particular witness. In fact, if you look -- and we got a survey and I know Counsel yesterday served the court with a supplemental authority. If -- if you look at HIPAA and really a lot of the cases that occurred prior to April of 2003 are probably no longer relevant because HIPAA to the extent that Texas is less stringent than HIPAA, HIPAA would control.

If Texas law is as stringent or more stringent, Texas law will control. In this case, we believe Texas law is as stringent or more stringent than what HIPAA is and again, we refer the Court to this case, the Moreland v. Austin case. In the Supreme Court of Georgia last week was faced with this very issue and in that case, it was a different situation. It was a request for disclosure and once you got the medical records then the defense lawyers under Georgia law were allowed to go out and talk to the doctors.

And the court found that this was less stringent than what HIPAA allowed and as a result, it didn't comply with HIPAA. But what the court said -- and I think it's very important because, I think it actually supports the position that's being advanced by the defendants in this case, the court said that the secretary of Health and Human Resources used his authority to prohibit health care providers from disclosing protected health information whether oral or recorded in any form of medium unless the providers comply with the secretary's rules and regulations.

The court goes on to say, of course, this information can be disclosed and they're talking about written as well as oral, without a court order if the patient signs a valid authorization.

And the court concluded that HIPAA clearly regulates the methods by which a physician may release a patient's health information including oral medical records and they conclude by saying, thus, in order for defense counsel to informally interview plaintiff's treating physicians, they must first obtain a valid authorization, which we had in this case, or protective order, which we didn't go get because we had the valid authorization or they've got to give notice.

JUSTICE O'NEILL: Well, okay, so you got an authorization --
MR. COOPER: Correct.
JUSTICE O'NEILL: -- and you got a protective order just to make it even more protected. You're -- you're claiming waiver now because -- because they didn't except out visits that might be protected --
MR. COOPER: Actually --
JUSTICE O'NEILL: -- so why wouldn't -- rather than -- rather than waiver what -- what harm is done by allowing it not to be ex parte?
MR. COOPER: Well, we're not really -- I'm not sure the waiver is what we're actually claiming. We're saying they have the ability; the Legislature has made the plaintiff the gate keeper --
JUSTICE O'NEILL: I understand.
MR. COOPER: Okay, I'm just saying --
JUSTICE O'NEILL: And you're saying -- but you're saying they didn't need it so therefore, they can't assert it?
MR. COOPER: But what we're saying is the trial judge when there's no indication in the record that there's nonrelevant information in the 25, and when the plaintiff herself has not accepted it out in Exhibit C that it makes no sense and it's a clear abuse of discretion in that case for the trial judge to say, you can't have any ex parte communications with these 25 treaters from MD Andersen who clearly treated the plaintiff for the cancer that she's suing our doctor for.
CHIEF JUSTICE JEFFERSON: What information in the record would show that the -- that it's not relevant?
MR. COOPER: Well, I think the burden under Texas law is on the party claiming the privilege to come forward to the trial court to show that there is nonrelevant information --
CHIEF JUSTICE JEFFERSON: How would they show that? I'm just curious.
MR. COOPER: Well, as we do it in any other case. You have the medical records, you submit it to the trial court in camera, the trial court looks at it and decides it's relevant to the case or it's not relevant to the case. That's the way we do it in most cases is you do an in camera submission, the trial court can look at it --
CHIEF JUSTICE JEFFERSON: Then maybe the trial court's order here is just to prevent the -- the -- you know, hauling in of boxes and boxes of information when --
MR. COOPER: Well --
CHIEF JUSTICE JEFFERSON: -- you know, if this prevent ex parte conversation and let you all take care of that outside the court house.
MR. COOPER: Well, with all due respect, I mean we had here cancer specialists who were treating the plaintiff for cancer which is what she says the defendant should have diagnosed --
JUSTICE BRISTER: I just scanned the motion for protective order. They don't claim there was anything irrelevant, did they?
MR. COOPER: They don't. It's just all --
JUSTICE BRISTER: Have they ever claimed that on appeal?
MR. COOPER: -- it's all sort of a tirade against ex parte communications. I see I'm out of time, if there's any questions, I'll be happy to --
CHIEF JUSTICE JEFFERSON: Any questions? Thank you, Counsel.
MR. COOPER: Thank you.
CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument from the real party in interest.
SPEAKER: May it please the Court. Mr. Kelly will present argument for the real party in interest.
JUSTICE BRISTER: How about that, Mr. Kelly, am I missing

something? I didn't see anything in the motion for protective order that claimed anything irrelevant was involved.

ORAL ARGUMENT OF PETER M. KELLY ON BEHALF OF THE RESPONDENT

MR. KELLY: No, there's not thing in -- in the motion for protective order specifically saying that there are bits of information that are relevant or irrelevant. What the Protective Order does is reserve to the trial court going forward the opportunity to determine on a case by case basis for each individual provider what is going to be relevant and what is not going to be relevant.

JUSTICE BRISTER: No, I mean the motion for protective order says, we don't like these defendants going in with a wink and smile, I think it says and molding their testimony. That's -- that was the gist of it.

MR. KELLY: Well, there are two ways. You can -- you can read it that way, I think, the real gist of it --

JUSTICE BRISTER: The real -- my question is a very simple one. If it only applies for the defense attorneys then the plaintiff's attorneys can go in with a wink and a smile and mold testimony, but not defense attorneys, that's -- that was the idea of the order.

MR. KELLY: Well if you ask it in an esoteric way like that without word of context --

JUSTICE BRISTER: No, I'm just reading -- I was reading from the motion, "with a wink and smile" is a direct quote.

MR. KELLY: Well, "with a wink and a smile" then that -- that does happen sometimes. In fact, there's a case going on right now involving witness tampering going on here in Austin where you have the defense lawyer going in and changing the testimony of the treating physician going forward --

JUSTICE BRISTER: So, your position is only defense attorneys do that.

MR. KELLY: No, that's not my position at all --

JUSTICE BRISTER: Why don't -- why don't we have this so you wouldn't object an order that prohibited the plaintiff -- the plaintiff's attorneys from doing that too.

MR. KELLY: Well, you can't prohibit the plaintiff from going and talking to his own doctor. That is just -- you can't do that if plaintiff's attorney --

JUSTICE BRISTER: If he's not treating him anymore?

MR. KELLY: There's an ongoing fiduciary obligation by the doctor to the plaintiff, ongoing physician-patient privilege, etc., etc. So, no, you can't prohibit the patient from going in and talking to his doctor, but you can prohibit the defendant from going to his doctor --

JUSTICE JOHNSON: Well, if the trial court has the discretion to prevent one person, lawyer or defendant or anyone from talking to another non-party, what difference does it make whether the person being prohibited is a defendant, a non-defendant, or a plaintiff or anybody else if we're going to allow in the trial court's discretion to just exclude and tell somebody you can't talk to a non-party -- non-represented nonparty?

MR. KELLY: The trial court's obligation and what the trial court is trying to do is prevent the disclosure of irrelevant privileged information and that is what the goal of Rule 509 is, that's what the goal of HIPAA is, and that's what the goal of the -- of the order

entered by the trial court is, to maintain some control of discovery going forward. Now, the plaintiff and the plaintiff's lawyer have full access to all the information ab initio, the defense lawyer does not. And once the defense lawyer gets access and it's disclosed -- the irrelevant privileged information is disclosed, you can't unring that bell --

JUSTICE MEDINA: Sure. Why can't the trial judges make a ruling during the course of the trial or -- or in motions in limine we discovered all of these, now it's -- it's your position it's not relevant. Why can't a ruling be made there?

MR. KELLY: Both in the context of the physician-patient privilege, it is a disclosure that is the harm, the disclosure to a third party of irrelevant privileged information. You can't get that back once it's been disclosed. The defense lawyer will have it in his custody at that point.

JUSTICE BRISTER: Of course, but I'm having trouble following that. We -- we give trade secrets to the other side, be it other side of attorney and the other side's expert and the whole presumption of doing that under a protective order is that you can't get it back and that we can trust lawyers not to -- I'm not sure what you think the defense attorneys going to do go out whispering in the community about the secret things they found out. I mean what possible reasons would the defense lawyer want this if they weren't going to try to introduce it at the trial when the trial judge could just exclude it?

MR. KELLY: First of all, to go back to the equation of trade secrets with personal medical information, I don't see any equation there whatsoever. One is the conduct of business, how someone makes money, it's in their busi--

JUSTICE BRISTER: But what Coca Cola disagree with you about their -- they spend millions of dollars protecting that trade secret. But let's -- let's assume -- let's assume --

MR. KELLY: -- personally embarrassed. That's the point of the privilege.

JUSTICE BRISTER: Let's assume that that this is a super privilege and trade secrets and -- and your pastor privilege and your husband-wife privilege and all those are just moderate privileges. But again, what purpose would a defense attorney have for it other than to use it at trial -- when the trial judge just excluded it?

MR. KELLY: Perhaps to try to catch somebody for impeachment purposes or just -- or any other -- it doesn't matter what the purpose is. The point is the disclosure itself is harmful. The disclosure to a third party, the publication to the defense lawyer, the defense lawyer staff. The fact that might end up in court records as public records. It doesn't matter what purpose he might want with it.

JUSTICE BRISTER: What would be the harm for having the plaintiff -- I mean the plaintiff surely knows what there is that's embarrassing or irrelevant. What would be the harm in having the plaintiff, as Mr. Cooper suggests, go into the trial judge in camera and say tell him not to talk about these things or don't talk to these doctors.

MR. KELLY: That was established by the order.

JUSTICE BRISTER: That -- that --

MR. KELLY: If you notice the ex parte --

JUSTICE BRISTER: There's -- there are 25 doctors -- this one is don't talk to anybody about anything unless I'm there.

MR. KELLY: Right.

JUSTICE BRISTER: So is everything -- is your position that every one of these doctors has nothing but irrelevant information?

MR. KELLY: No. They might have relevant and irrelevant information.

JUSTICE BRISTER: But why don't we make somebody -- I mean, what we do in all the rest of the rules is you got to ask for specific information first of all and then -- that's that might be privileged. And then the party comes in and has to make a showing why we don't do that rather than just a blanket -- I mean, this is as blanket an order as you could get.

MR. KELLY: Well, the flipside of it is the blanket right to have an ex parte communications go fishing for privileged information. And so on one hand, you have that. The defendant's claim with the right to ex parte conduct --

JUSTICE BRISTER: No, these are -- these are fact witnesses.

MR. KELLY: They're fact witnesses.

JUSTICE BRISTER: Is there any other kind of fact witnesses you can get a protective order that one side can't talk to any of fact witnesses?

MR. KELLY: Well, you know, one hypothetical might be if you're suing a hospital for nursing malpractice and you want to talk to the nursing administrator. Can the plaintiff's lawyer just call up the nursing administrator as an employee, a managerial employee of the hospital, and talk to her off --

JUSTICE BRISTER: That's a special kind of fact witness. That's under the control of a party.

MR. KELLY: Well --

JUSTICE BRISTER: Obviously, you can't talk to the other party without their attorney present.

MR. KELLY: Well --

JUSTICE BRISTER: This is just a non- represented, a non-party, a fact witness. Can you think of any other circumstance, anywhere, in civil procedure or criminal procedure where you could get a blanket order saying one side can talk to the fact witnesses and the other side can't?

MR. KELLY: Well, let's go back up to why this is exactly --

JUSTICE BRISTER: If you can think of another one, tell me.

MR. KELLY: It is the same. It is the same circumstance as the nursing administrator. Because what knowledge does the nursing administrator have? It's knowledge that has been given to her by her employer. What knowledge does the doctor have? That is knowledge that's been given to him by his employer, the person contracted with the doctor to quote for medical opinion. It's in the control of the plaintiff, in the control of the patient. He is giving that information to the doctor for limited purpose of diagnosis and treatment. He continues to maintain control over that information. It is still privileged.

JUSTICE HECHT: Is it important to your position that the physicians or the treaters on Exhibit A have -- actually had relevant information?

MR. KELLY: No, it's not, because the question of what is relevant and irrelevant is a question that should be reserved to the trial court.

JUSTICE HECHT: But, is this -- so the Court of Appeals sort of went off. They seemed to have been influenced by the fact that this was a reasonable way of protecting disclosure of irrelevant information. But I sort of took it from your briefing that the broader issue was at stake and that is whether there's going to be any ex parte communication or -- at all under any circumstances.

MR. KELLY: The limited question of whether the trial court's ruling was correct is answered by the question by the fact the trial court should maintain control over what is relevant and irrelevant. We don't necessarily --

JUSTICE HECHT: There's no contention that any of it's irrelevant?

MR. KELLY: Pardon?

JUSTICE HECHT: There's no contention that any of it's irrelevant. You just told me.

MR. KELLY: But the risk if there is something irrelevant, that is something that the trial court should maintain control of.

JUSTICE HECHT: But there's no -- you don't know if there's any risk. I just asked you if it was important to you. You said no.

MR. KELLY: But the countervailing risk though, that there is irrelevant information that would be disclosed, that is something that you can never get back once it's been disclosed.

JUSTICE HECHT: But who's doing it? These are your -- these are your including people at MD Anderson is there any --

MR. KELLY: I don't know specifically whether they have irrelevant information but it's not necessary to the proprietary -- to the propriety of the order prohibiting ex parte contact as a prophylactic function to prevent the disclosure, even the possibility of disclosure of irrelevant information.

JUSTICE HECHT: Well, there will always be that possibility so there could always be this order?

MR. KELLY: If the plaintiff moves with the order and as in Mutter v. Wood, inclusive of the appropriate safeguard, the trial court has the discretion to put those safeguards in place for the contacts with the -- with the treating physicians.

JUSTICE MEDINA: How's the trial judge to determine that without looking at the documents are or having more information in what a lawyer from either side tells him? I mean, how's that just not a clear abuse of discretion to sign a blanket order without more -- more information?

MR. KELLY: Because it is -- it is the burden and it is the right of the plaintiff and the burden of the plaintiff to make the motion for protective order prohibiting ex parte communications. The idea that the plaintiff could go back and -- and somehow predict everything that the -- each treating physicians, especially in a case like this where you have dozens of treating physicians might -- might say in response to questioning by the defense lawyer or if the defense lawyer might go off the reservation and go fishing for irrelevant information. That it's -- you know, especially if you have a long course of treatment.

JUSTICE O'NEILL: Let me -- let me just ask you. I may get the opposite answer from opposing Counsel, but what's the practice in med mal cases. I never handled one but is there an understanding as to whether ex parte communications like this are allowed or not allowed?

MR. KELLY: I have seen and my experience has been -- that the defense bar has got increasingly aggressive about ex parte contact with the treating physicians. And I don't have any specific numbers that it has to be of necessity, anecdotal evidence but there is an increasing likelihood that ex parte contact would occur.

JUSTICE HECHT: Why don't you just tell him not to talk to the other side?

MR. KELLY: I think it's better to have the judge tell them not to talk to the other side. It has a little more -- a little more --

JUSTICE BRISTER: But this -- if you don't submit anything to the trial judge but it's the trial judge's discretion, what guides the

trial judge's discretion?

MR. KELLY: In terms of a preliminary order --

JUSTICE BRISTER: You said you don't have to show that there's any real risk or anything irrelevant. All you have to do is ask for this and the trial judge has the discretion to grant it. What is that -- what guides that discretion? Is it just whether some trial judges feel like defense attorney shouldn't talk to experts and some feel like they should?

MR. KELLY: In this Court's ruling in Mutter v. Wood -- "Mutter" or "Mooter', I don't know how you pronounce it, the -- this Court said that the trial court, upon request by the plaintiff from proper motion by the patient, does not require showing of any specific irrelevant information. It would be an abuse of discretion to not issue that order. So what we have here is the plaintiff has requested the court to issue an order prohibiting ex parte contact. So it's not prohibiting --

JUSTICE BRISTER: So it's basic -- it's basically an unbridled discretion? The trial judge -- there has to be no showing. And the trial judge can just do it or not.

MR. KELLY: There has to be a showing and request. There does not have to be a specific showing that there is potentially harmful irrelevant information out there. What we're talking about is the -- the privacy right which is respect -- it's cultural and social. It's respected in the law.

CHIEF JUSTICE JEFFERSON: So what if the law -- what if in the motion for protective order, Paragraph 1 says every bit of information and it's only one doctor that we're dealing with and he's the only one that treated the patient and the allegation is malpractice. In Paragraph 1 of the motion for protective order, the plaintiff says, "Every single document in this doctor's possession is relevant to the claim that we asserted." Paragraph number 2 says, "Please give us a protective order preventing ex parte communication." Should the trial court sign that and give a protective order or not, and why?

MR. KELLY: Well, I guess one question would be, how was the authorization made -- obtained? And the second question would be, is it compliant with HIPAA?

CHIEF JUSTICE JEFFERSON: All of it is compliant and -- but the plaintiff concedes that there is nothing irrelevant in the information in the -- in the medical records of this doctor, and the only information he has bears directly on my claim against that doctor, but I want an order from you prohibiting the defense counsel from getting ex parte conversation with that physician. Is that -- would that be an appropriate order for that judge to sign?

MR. KELLY: That -- that would have to be the most extreme case possible, that there is -- that the doctor would have absolutely no knowledge whatsoever. And if there is only one doctor involved and there is absolutely no risk, I would say under this Court's holding, under Mutter v. Wood, the plaintiff has the right to and obtain that prohibition against ex parte --

CHIEF JUSTICE JEFFERSON: So all we're talking about here really is -- is there, you know, a right that the plaintiff has in all of these medical malpractice cases to prohibit ex parte contact period?

MR. KELLY: Well, that is -- that is the first question. The second question is: Where does it fall in regard to federal regulations and federal statute? And what happens is under -- under current Texas law, the plaintiff has the right and the opportunity to seek that protection, but the burden shifts once you start applying federal law. And if the federal law hereby is more stringent than Texas law, then

the burden shifts over to defendant to comply with HIPAA and to obtain the proper court authorization and to get the authorization to speak to any of the treating physicians for the release of any medical information.

JUSTICE BRISTER: HIPAA doesn't prevent disclosure, pursuant to court order, or authorization; either one.

MR. KELLY: Not pursuant to court order.

JUSTICE BRISTER: That's specifically part of HIPAA.

MR. KELLY: Right.

JUSTICE BRISTER: It has those specific exceptions.

MR. KELLY: Correct.

JUSTICE BRISTER: And if the Legislature has said, "I want to sue for this. Here's the form you signed and you can have verbal communications authorized by it,"-- aren't you asking trial judges to just overrule the Legislature? If trial judge didn't -- if the trial judge here just decided, "I'm not going to follow that."

MR. KELLY: No, because the authorization does not impact the physician-patient privilege or what this Court said in Mutter v. Wood regarding the availability of an order prohibiting ex parte. That is specifically within the legislative history, the colloquy between Hinojosa and Ratliff something --

JUSTICE BRISTER: It's specifically authorizes disclosure. I mean if the doctor wanted to say I'm too busy and don't want to fool with it, it doesn't force the doctor to do it. But it -- if the reason is I don't want the doctor to talk to him because he doesn't have my consent, it specifically gives that consent.

MR. KELLY: Well, what consent -- the question is what consent is given by that authorization. It requires --

JUSTICE BRISTER: Well, then that depends which --

MR. KELLY: -- disclosure of information. It doesn't say anything about --

JUSTICE BRISTER: -- which sections do you fill in. I mean you can except out some stuff and include other stuff, but you can't just say all of them everywhere under all conditions. Or if you do -- I suppose you could, but then you might be sanctioned because it's not true. I mean we don't want people lying in this authorization forms they're signing, do we?

MR. KELLY: No, we wouldn't want that. But if you have the authorization form combined with an order prohibiting ex parte contact that is perfectly in compliance with House Bill 4 in the state of legislative intent. They did not intend to overrule Mutter v. Wood. It is still available to get an order prohibiting ex parte contact and you still can have the disclosure. So the disclosure that is made is essentially in written form.

JUSTICE WILLETT: What was the label in prestatute could defendants before the statute was passed have ex parte talks with non- treating physicians?

MR. KELLY: Well, defendants can still have ex parte talks with nontreating physicians now unless there's a court order prohibiting it. But there was -- prior to House Bill 4, there was a medical record authorization form promulgated under 4590(i) that did not have -- that did not go into much detail. You could break it into B1, B2, and sub C.

JUSTICE BRISTER: As Mr. Cooper says if it's 25 doctors, it could save a lot of time and money to just call them up rather than setting up a deposition, wouldn't it?

MR. KELLY: That's one of the interesting things touched on in the Moreland case out of Georgia is that if the statute is -- if Texas law

is pointed at streamlining the process, that's separate and apart from HIPAA which is on -- in protecting patient privacy. And if streamlining the process is the goal of all our jurisprudence, you know we could allow to a few depositions or a lot of things we'd be doing to make --

JUSTICE BRISTER: But HIPPA's out of the way if you got a HIPAA -- if HIPAA authorized authorization, that's it on HIPAA.

MR. KELLY: If it is truly HIPAA compliant, if it meets everything and there has to be noted -- and one of these few things about HIPAA is it does not seem to contemplate blanket authorizations as 74.052 does. It is very much pointed to individual data and it relates to the individual. You know for instance one of the arguments made about HIPAA is less stringent because there are other circumstances in which it would not -- the disclosure would be prevented under HIPAA.

Well, that -- that's not really relevant because it's pointed to the disclosure of the specific data relating to the individual. The disclosure to that particular person requesting it, and the burden is on the person requesting it to establish that it is completely HIPAA compliant.

JUSTICE WAINWRIGHT: And so give me a list the reasons why you want to be present if the Defense Counsel talks to nonparty treating physicians?

MR. KELLY: First and foremost is the disclosure of personal information. Secondly would be the disclosure of embarrassing personal information.

JUSTICE WAINWRIGHT: Well, if -- unless you're reading the doctor's mind, you're sitting there and Defense Counsel's sitting there in the doctor's office, you won't know what's going to be disclosed until it's disclosed. So whether you're sitting there or not, won't it be disclosed?

MR. KELLY: Not necessarily. I mean let's imagine a sponge case where, you know, we have a foreign object left in. Someone's having intestinal pain for years. They go to doctor after doctor. Defense lawyer asks, "Well, what else we have you tested for, x, y and z. What else did you find?" Well, you don't want to find out he's on -- whatever else it might be. It's not relevant to the fact there's a sponge in the case. Plaintiff's lawyer could say that is not relevant.

JUSTICE WAINWRIGHT: That presume -- does that presume the doctors don't know about the scope of the authorization? The doctors don't know not to talk about irrelevant personal information?

MR. KELLY: Well, the question though --

JUSTICE WAINWRIGHT: Maybe that's the case. I don't know but --

MR. KELLY: Lawyers can't agree what's relevant. And the case law is right with -- you know, appellate court is disagreeing with trial courts on what is relevant. The lawyers can't agree whether it is legally relevant. Then you have a second question of what is medically relevant. In the sponge case what maybe medically relevant to the diagnosis of the sponge is separate and apart from and maybe legally relevant to causation, liability, or damages.

JUSTICE WAINWRIGHT: So you want to be present to ensure that irrelevant information isn't disclosed and that private medical information is not disclosed?

MR. KELLY: Correct.

JUSTICE WAINWRIGHT: Any other reasons?

MR. KELLY: Those would be the principal reasons, and to make sure that there is no attempt by the Defense Lawyer to say more perjury, let's say, shape the opinion of the -- of the treating physician.

JUSTICE WAINWRIGHT: Is that it?

MR. KELLY: And that would be, I don't want to get pinned-- I feel like I'm in a deposition right now if anything else.

And the other issue is I'll supplement it if they come up --

JUSTICE WAINWRIGHT: [inaudible]

MR. KELLY: But the reverse issue is that there is so much mischief that can be done on the other hand if you don't have the plaintiff's in any -- any relevant information that's there, the defense lawyer can get by deposition by a phone call with plaintiff's lawyer on the line. The plaintiffs -- the defendants are not -- I mean all you are talking about is a 60-day delay here in getting that information.

JUSTICE WAINWRIGHT: Counsel, as you know, there's a lot of information you can get by seeing the witness, talking to the witness, seeing their gestures, mannerisms. It's not just what's written on a piece of paper in the medical record.

MR. KELLY: Correct. And I think that argument is made --

JUSTICE JOHNSON: But let me -- and I know you're over your time, but let me ask you a question. You say one of the concerns is the molding or tilting a testimony possibly, then if that is a concern, would the defendant be entitled to the same type of order as this one is which is precluding the plaintiff's attorney from contacting ex parte and one of the things crossed out in this order, disclosing every contact that they have had. Does it cut both ways if that is the concern -- a concern in precluding ex parte conversations?

MR. KELLY: I don't think it is because you have the -- you have the unique relationship of the patient with the treating physician. In the same way you have the unique relationship of employer [inaudible] --

JUSTICE JOHNSON: We're talking about law -- we're talking about a lawyer, a lawyer talking to a witness and the concern -- that one of the concerns is that the defense lawyer would mold the testimony and the other can -- so would that not be a similar concern as to a plaintiff's lawyer so that the defense lawyer could then go to the trial court? We're going to give this discretion to the trial court to say, "Plaintiff's lawyer, you can't go to these treating physicians ex parte unless you get the defense lawyer in and tell the defense lawyer everyone you visited with so we can show that defense lawyer the unsaid part is so the defense lawyer can follow your trail and find out what you've done." It seems like if we're going to delve into controlling that, we're going to have to look at both sides.

MR. KELLY: Well, if that goes back into --

JUSTICE JOHNSON: These are the lawyers. These are lawyers. Not the parties, the lawyers.

MR. KELLY: But the lawyer is the party. When this Court writes an opinion, they're going to talk about what the Regians do, not what Peter Kelly and Bill Levy do. They're going to talk about what arguments the Regians have made in the same way in the courthouse and in talking to witnesses, the lawyer is the party. The lawyer acts bind the party and he's acting with the party's authorization.

JUSTICE O'NEILL: That's not unheard of. Wasn't there a case that I saw somewhere cited where -- maybe it's in a mass tort sort of contacts where the trial court prohibited lawyer contact with any of the doctors, lawyer expert they contact plaintiff and defense counsel which would not preclude the patient from going to see the doctor but what accommodate this concern that Justice Johnson is getting at?

MR. KELLY: In the mass tort contact, I think it was the Seroquel litigation, I'm not sure, that is a completely different concern. I mean you have what went on down in Corpus Christi wherein Judge Jacks

wrote about, where you have -- it's not really a -- it's a different type of relationship between these treating physicians, the subsequent treaters were asked to, you know -- were asked to see that the claimant for 20 minutes can go on.

And there are specific exigencies in that type of case which might make that appropriate. But in a standard medical malpractice case, you don't really have that. You have someone with, you know -- they might have -- they're physicians for 20 years and you don't want the defense lawyer or just complete strangers calling up and conducting ex parte interviews with them.

And the concept of privacy, there's a broader policy interest in having plaintiffs being completely frank with their -- with their doctors. It's almost a psychological compulsion that you want to have that -- that information protected and you want to be around or have your attorney around to make sure that irrelevant privileged information is not disclosed. No further questions?

CHIEF JUSTICE JEFFERSON: No further questions. Thank you.

JUSTICE WILLETT: Mr. Cooper, I have a couple for you. And I think the first one I first [inaudible] with Mr. Kelly, I meant to ask on prestatute, could a defendant have an ex parte communication with nonparty treating physicians?

REBUTTAL ARGUMENT OF BRENT COOPER ON BEHALF OF THE PETITIONER

MR. COOPER: Prestatute, there were three or four court of appeals cases, the Rios case. There's a whole case which indicated you could. You had a couple of --

JUSTICE O'NEILL: Well --

MR. COOPER: -- which indicated that it was not against the ethical --

JUSTICE O'NEILL: But first --

MR. COOPER: -- violation for the lawyer. You have some federal cases. Perkins case which said you could not. There was some lack of clarity prior to the passage of Chapter 74.

JUSTICE O'NEILL: Now, the -- the response brief attaches, I think it's from the Supreme Court Advisory Committee hearing --

MR. COOPER: 514?

JUSTICE O'NEILL: Yes. And the -- the John Martin testimony said nobody on our subcommittee, nobody thought this authorization allowed a defense lawyer to go talk to plaintiff's doctor.

MR. COOPER: I can't speak for John Martin. I know him. He's a very smart lawyer. But if you look at the draft, the 514 they had in there, one of the things they put in there was, if you have an authorization, you can go out there and talk. If you read --

JUSTICE O'NEILL: But it doesn't say anything about ex parte.

MR. COOPER: Well, I think clearly with the passage of Chapter 74 when they talk about the verbal, the only way you get to verbal medical records is through a conversation, your Honor.

JUSTICE O'NEILL: Well, again, that you can have a conversation doesn't mean that -- it has to be ex -- or can be ex parte. To me, that doesn't answer the question.

MR. COOPER: Well, I think -- you're giving the defendant the authorization to go out and get written medical records, and I don't think anybody would say that the plaintiff's lawyer have to be with the

defendant when he goes to get the written medical records but you're also giving the defense lawyer an authorization and she did in this case to get verbal medical records as well.

And I think if you look at all the HIPAA cases that we've cited, all the ones we could find, the ones that have gone against it are those where there was a valid court order or where there wasn't a valid HIPAA authorization. The cases where there is a valid HIPAA authorization or where there is a valid court order, the courts have allowed ex parte communications. And you've got to wonder what the Legislature didn't mean when they put the verbal in the statute. It had to mean something and --

JUSTICE WILLETT: Mr. Cooper, my -- my second question, this is of course before it's on mandamus and clear abuse of discretion. And you said, the trial judge said I may well have come out the other way. I don't know, but how can we say the trial court, you know, went rogue. You know acting without regard or any kind of guiding rules or guidelines.

MR. COOPER: Because I think what he was in effect doing, he had no evidence that there is any nonrelevant information in the 25 treaters on Exhibit A. So we had no evidence of that and basically what he's doing is saying, "Okay, we're going to trump what the Legislature has provided in the authorization." And so I think, he's going contrary clearly to what the Legislature had put in the authorization that is that there could be -- you could obtain through the authorization verbal information as well.

JUSTICE WILLETT: You claim there was really no discretion at all to rule the way he did. It was simply -- he just flat out offended the statute.

MR. COOPER: Well, again, his counsel said under their view it doesn't make any difference if it was relevant or nonrelevant. We're just not going to let anybody talk to these doctors. And Justice O'Neill was In Re Vioxx case which was out of Louisiana was the one that you're talking about and one of the things they pointed out there in that case was, the judge said, "We're not going to let plaintiff's lawyers go out there and have ex parte as well because frankly, they're in a better position of intimidating the witnesses than the defense lawyers because they can threaten to sue them unless they testified a certain way."

And so in the MDL judge in that case sort of put it on both sides. Now, we're not asking the Court to do this because I don't think there's been any evidence that that happened.

The last thing -- and, Judge O'Neill, you asked about how prominent are ex partes today? If anybody has been to the hospital recently, you get your bills and your records, there are literally dozens and dozens of people who are involved in the healthcare treatment today if there's hospitalization. And does that mean that all 25 need to be deposed? Probably not.

But to do your job as a defense counsel, you need to try to whittle away the ones really who have no knowledge that's going to be really relevant in the case and the best way to do that is to try to call and say, you know "What did you do? What did you see? What did you hear?" and whittle down that. So it is something that it is used today primarily because the proliferation of the number of people who are involved in healthcare treatment that is out there today.

Finally, with respect to Mutter v. Wood, we would encourage the Court to read its own opinion where the Court said the authorization signed -- that the Mutters were ordered to sign completely waived the

physician-patient privilege as to all physicians who provided care or treatment. It provided no reasonable method to allow the Mutters to preserve whatever claim of privilege they might have because -- they might have.

In this case, the form that was -- they signed, completely allowed them to pull out anything that they felt was irrelevant. So we are in a different time period. We have a different authorization that was involved in the [inaudible].

CHIEF JUSTICE JEFFERSON: Any questions? Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

SPEAKER: All rise.

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